

**PREPARED STATEMENT OF
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ON BEHALF OF THE NOT-FOR-PROFIT AND CHARITABLE COALITION**

**TESTIMONY BEFORE THE SUBCOMMITTEE ON CONSUMER AFFAIRS,
FOREIGN COMMERCE AND TOURISM OF THE UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION**

**HEARING ON THE REAUTHORIZATION OF
THE FEDERAL TRADE COMMISSION**

JULY 17, 2002

I. Introduction

Mr. Chairman and Members of the Subcommittee, my name is Dennis H. Alldridge. I am the President of the Special Olympics Wisconsin ("SOWI"). I appear today before the Subcommittee on behalf of the Not-For-Profit and Charitable Coalition ("Coalition") to offer testimony on the irreparable harm on nonprofit and charitable organizations that will result from the Federal Trade Commission's ("Commission") implementation of a national "Do-Not-Call" registry pursuant to proposed amendments to the Telemarketing Sales Rule, 16 C.F.R. § 310 *et seq.* ("TSR"). At the outset, I want to clarify that my testimony is limited to the negative impact of the "Do-Not-Call" registry as applied to nonprofit and charitable organizations and their professional fundraisers, that is, *noncommercial* conduct that is not

intended to induce purchases of goods or services under the TSR and the Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 *et seq.* (“Telemarketing Act”).

As discussed in written comments filed with the Commission¹ in response to the Commission’s Notice of Proposed Rulemaking, *see* Notice of Proposed Rulemaking, 67 FED. REG. 4492 (Jan. 30, 2002) (“Notice”), SOWI and the Coalition strongly oppose the proposed TSR amendments and the national “Do-Not-Call” registry as applied to nonprofit and charitable organizations.² The “Do-Not-Call” registry will decimate an already cash poor nonprofit and charitable industry. By the Commission’s own estimates, up to 40 percent of all households will sign up with the “Do-Not-Call” registry. *See* Federal Trade Commission, *Fiscal Year 2003 Congressional Justification Budget Summary*, at 6. This probably is a conservative estimate based on information cited by the Commission. But even assuming the accuracy of the estimate, there is no doubt that most nonprofit and charitable organizations will not survive with a 40 percent reduction in communications with current and prospective donors and commensurate erosion of their charitable message and donations.

¹ SOWI’s comment is available on the Commission’s website at <http://www.ftc.gov/os/comments/dncpapercomments/04/sowiconsin.pdf>. The Coalition’s comments are available at (1) <http://www.ftc.gov/os/comments/dncpapercomments/04/notforprofit.pdf>, and (2) <http://www.ftc.gov/os/comments/dncpapercomments/supplement/npcc.pdf>. These written comments are incorporated by reference into this Prepared Statement.

² The Coalition participated in the public forum on the proposed TSR amendments held by the Commission on June 5-7, 2002. A transcript of the proceeding has not been released by the Commission.

The Coalition has three major concerns. First, the “Do-Not-Call” registry as applied to professional fundraisers soliciting contributions on behalf of nonprofit and charitable organizations will devastate these organizations. It will reduce funding, impede the fulfillment of mission objectives, and silence the constitutionally protected dissemination of the nonprofit and charitable message. Second, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56 (Oct. 25, 2001) (“USA PATRIOT Act”) did not give the Commission jurisdiction to regulate nonprofit and charitable institutions and their professional fundraisers. Nor did it give the Commission authority to restrain nondeceptive, nonabusive, and legitimate charitable solicitations by professional fundraisers acting on behalf of legitimate nonprofit and charitable organizations. The Commission’s contrary interpretation departs from its 1995 Advisory Opinion that the TSR generally imposes no restrictions on the legitimate fundraising activities of nonprofits and their professional fundraisers because a donation is not “telemarketing” under the Telemarketing Act and the TSR. Finally, the Coalition believes that the “Do-Not-Call” registry is unconstitutional as applied to professional fundraisers who solicit charitable donations on behalf of nonprofit and charitable organizations. Such conduct by professional fundraisers is fully protected noncommercial speech under the First Amendment.

We appreciate the willingness of the Subcommittee and staff to listen to the concerns of the nonprofit and charitable community, and we look forward to continuing our work with the Subcommittee in order to achieve a resolution. We respectfully submit that the only viable resolution is to permit nonprofit and charitable organizations to continue to fulfill their vital

public functions by excluding from the Telemarketing Act and the proposed TSR amendments (including the proposed national “Do-Not-Call” registry) charitable solicitations by professional fundraisers on behalf of nonprofit and charitable organizations.

II. Overview of Special Olympics Wisconsin and the Coalition

My testimony today is based on more than twenty years experience in the nonprofit sector with the Special Olympics. I have been President of SOWI since 1989. Prior to my position with SOWI, I was the Executive Director of Illinois Special Olympics, Inc. between 1980-1989. As the Chief Executive Officer of SOWI, I have responsibility for the organization’s planning, budgeting, public relations, and fundraising. These responsibilities are conducted in accordance with the standards, policies and procedures of the Special Olympics International and SOWI including, for example, SOWI’s fundraising guidelines and “Do-Not-Solicit” list.

SOWI is an accredited program of Special Olympics, Inc. (“SOI”). SOI is an international nonprofit organization founded by Eunice Kennedy Shriver in 1968 to provide sports training and competition to persons with cognitive disabilities.³ SOI programs are patterned after the Olympic Games. In fact, SOI is the only organization authorized by the International Olympic Committee to use the word “Olympics” in its corporate name. Similar

³ Special Olympics’ mission is to provide year-round sports training and athletic competition in a variety of Olympic-type sports for persons eight years of age and older with cognitive disabilities, giving them continuing opportunities to develop physical fitness, demonstrate courage, experience joy and participate in a sharing of gifts, skills and friendships with their families, other Special Olympics athletes and the community.

to the Olympics, SOI has a global presence, with programs in every state and in 150 countries. It serves nearly 1,000,000 athletes and 500,000 volunteers who take part in more than 15,000 Special Olympics games around the world, involving 24 summer and winter sports.

SOWI alone serves 9,000 athletes in 220 Wisconsin communities participating in 72 statewide competitions. Participation in sports brings significant benefits to people with cognitive disabilities of all ages and abilities. Through the work of SOWI, persons with disabilities are given physical benefits (fitness, increased coordination, cardiovascular fitness and endurance), mental benefits (knowledge of rules and strategy, along with increased self-esteem, self-confidence, and pride), and social benefits (teamwork, interaction with peers and people without cognitive disabilities, opportunity to travel and learn about other places and interests, family pride, and increased community awareness and acceptance). These benefits empower SOWI athletes to lead richer, more rewarding lives by applying new skills and confidence to school, work, home and social life.

SOWI's nonprofit mission is reflective of other members of the Coalition. The Coalition is composed of 277 national, state, and local nonprofit and charitable organizations with tax-exempt status under the United States Internal Revenue Code, 26 U.S.C. § 501(c), that oppose the Commission's proposed rule. The Coalition includes a broad spectrum of organizations in the nonprofit and charitable sectors that provide highly diversified program benefits to the public and their members. It includes national nonprofits devoted to fighting disease and improving the quality of life for Americans such as Mothers Against Drunk Driving, The National Federation for the Blind, the Cancer Federation, and the Leukemia and

Lymphoma Society. Many Coalition members target the special needs of sick or missing children such as The Kids Wish Network, Miracle Flights for Children, National Children's Cancer Society, and the Committee for Missing Children. In addition to these national charities, the Coalition consists of more than 180 statewide membership organizations representing hundreds of thousands of active and retired law enforcement officers, professional and volunteer fire fighters, Jaycees, and veterans.

The public benefits created by the Coalition members are substantial and unparalleled. The various public safety organizations represent police chiefs, sheriffs, highway patrol, state and municipal police, narcotic officers, fire chiefs, professional fire fighters, paramedics and state investigatory personnel. As full time public safety personnel, the organizations are a unique and unrivaled source of knowledge and expertise on law enforcement, the fire service, and emergency medical services. They offer advice and counsel on criminal apprehension, detention, enforcement, fire safety, delivery of fire fighting services, and anti-terrorism expertise. They provide training and education on topics such as enhancements in law enforcement and fire fighting technology which improve the quality of services realized by the public. And many of the organizations sponsor comprehensive public service and educational programs on issues such as seat belt usage, home fire prevention, alcohol abuse, safe driving, illegal drugs, missing children, and community policing.

Thousands of charitable causes and state and local community programs are sponsored, supported or funded by these public safety organizations. A few examples illustrate the connection between the Coalition members and community programs. Professional fire

fighters represented in the Coalition provide extensive volunteer and financial support for The Muscular Dystrophy Association, and similar national support is provided by law enforcement organizations to the Special Olympics. Other examples include death benefit and benevolent programs for public safety officers killed or injured in the line of duty, scholarship programs for high school students, summer camps for underprivileged youths, hospital visits to children with terminal illnesses, and support of burn camps and burn victims.

The Coalition also includes a significant number of state military veterans organizations affiliated with the American Legion, Military Order of the Purple Heart, Veterans of Foreign Wars, AMVETS, and the Vietnam Veterans of America. Together, these organizations facilitate, support, and fund countless public initiatives such as emergency financial aid; relocation, medical, employment and educational services for veterans; support for orphans and widows of veterans killed in the line of duty; assistance to disabled veterans in securing Veteran's Administration benefits and obtaining medical treatment, coordinating volunteer efforts that provide hundreds of thousands of hours of uncompensated services to hospitals; assisting veterans in obtaining employment; and providing transitional housing for homeless veterans.

III. Summary of the Proposed TSR Amendments

The TSR regulates specific deceptive and abusive telemarketing practices as defined by the Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 *et seq.* ("Telemarketing Act"). Enacted in 1994, the Telemarketing Act represents an effort by Congress to address fraudulent commercial telemarketing conduct harmful to consumers. That

mandate, however, does not support a regulatory interpretation that creates a government-imposed prohibition against communicating with certain consumers – upon risk of federal, state or civil liability. Nor does it support a regulatory scheme creating a mandatory fee-based telephone registry that will eliminate or significantly reduce *all* nonprofit and charitable telephone calls regardless of whether they are fraudulent, abusive or deceptive.

Under the Telemarketing Act, the Commission’s regulatory authority has been limited to deceptive and abusive telemarketing acts and practices intended to induce the purchase of goods or services, that is, *commercial conduct*. The Commission now proposes a fundamental departure from this approach that will compromise substantially the ability of nonprofit and charitable organizations to generate funding necessary to fulfill their vital missions and silence their nonprofit message. First, the Commission seeks to expand its jurisdiction by regulating nondeceptive, nonabusive, noncommercial and admittedly legitimate charitable solicitations by professional fundraisers acting on behalf, and as an extension, of nonprofit and charitable organizations.⁴ And second, the Commission seeks to implement a national “Do-Not-Call”

⁴ In fact, the Commission cites implicit Congressional support for the “Do-Not-Call” registry to regulate nondeceptive and entirely legitimate nonprofit and charitable communications. The Commission states that “Congress recognized that telemarketers’ right to free speech is in tension with and encroaches upon consumers’ right to privacy within the sanctity of their homes. . . . Congress provided authority for the Commission to curtail these practices that impinge on consumers’ right to privacy but are not likely deceptive under FTC jurisprudence. This recognition by Congress that even non-deceptive telemarketing business practices can seriously impair consumers’ right to be free from harassment and abuse and its directive to the Commission to reign in these tactics, lie at the heart of § 310.4 of the TSR.” *See* Notice, 67 FED. REG. at 4543. 16 C.F.R. § 310.4, as proposed, will make it an abusive telemarketing act or practice in violation of the TSR if a professional fundraiser – acting on behalf of a nonprofit and charitable organization – places an outbound telephone call to any

registry applicable equally to commercial telemarketers and noncommercial charitable solicitations by professional fundraisers on behalf of nonprofit and charitable organizations. Combined, the proposed amendments will give the Commission the authority to do indirectly what it acknowledges cannot be done directly under the Telemarketing Act, that is, regulate nonprofit and charitable organizations by asserting jurisdiction over their inextricably linked agents and service providers that perform charitable solicitations on their behalf and function as an extension of these organizations.

The Commission purportedly justifies the amendments on the grounds that consumers have a heightened interest in residential privacy and need protection against unscrupulous telemarketers that may perpetrate fraudulent charitable solicitations, *see, e.g.*, Notice, 67 FED. REG. at 4497 n.51. These are laudable goals, but there can be no serious question by the Commission that SOWI and members of the Coalition are not fraudulent. In fact, in the past, the Commission has found comparatively little evidence of charitable solicitation fraud.⁵ The vast majority of TSR comments filed with the Commission did not identify fraud as an issue, much less alleged nonprofit and charitable solicitation fraud. Notice, 67 FED. REG. at 4495 (“A majority of the comments received during the Rule review focused on issues relating to

donor who subscribes to the “Do-Not-Call” registry.

⁵ Prepared Statement of the Federal Trade Commission on Charitable Solicitation Fraud before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, United States House of Representatives (Nov. 6, 2001) (“To date, the findings of fraud are few and far between, and the Commission continues to monitor this situation as aggressively as any the Commission has ever pursued”).

consumer privacy and consumer sovereignty, rather than on fraudulent telemarketing practices”). Indeed, the Better Business Bureau and other organizations consistently rank charitable solicitation fraud extremely low on complaint lists.⁶ To the extent that residential privacy is at stake, the Commission’s broad and indiscriminate approach to regulate *all* telephone calls is neither constitutional nor reasonable based on the clear damage to nonprofit and charitable organizations.

IV. The Proposed TSR Amendments Will Have a Devastating Impact on Nonprofit and Charitable Organizations by Interfering with Their Nonprofit and Charitable Missions

The proposed TSR amendments will have an irreparable negative impact that will limit dramatically the ability of nonprofit and charitable organizations to use the services of professional fundraisers. The consequences will be devastating for members of the Coalition and include, but are not limited to, massive reductions in donations, diminished ability to satisfy important public safety and community functions based on limited resources, and substantial harm to consumers who benefit from, and rely upon, these functions. Perhaps the most significant harm will be silencing the communication and fulfillment of the mission objectives of nonprofit and charitable organizations. As noted by the United States Supreme Court, nonprofit and charitable organizations use professional fundraisers “who ‘necessarily

⁶ See, e.g., Better Business Bureau Annual Complaint Summary – 1999 (ranking complaints against national charities as 524th on its list of complaints by type of business, with complaints against local charities ranking 271st); National Fraud Information Center, Telemarketing Fraud Statistics (charitable solicitation fraud not listed in the “Top 10 Frauds” in 2000 and 2001).

combine’ the solicitation of financial support with the ‘functions of information dissemination, discussion, and advocacy of public issues.’” *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980) (citation omitted). See *Riley v. Nat’l Fed. of the Blind*, 487 U.S. 781, 798 (1988) (“where the solicitation is combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself”) (citations omitted). Interfering with the solicitation of support likely would end the advocacy of ideas. *Schaumburg*, 444 U.S. at 632.

Professional fundraisers are essential to the fulfillment of the nonprofit and charitable mission and necessarily involve the fundraisers’ communication of the nonprofit message. For example, SOWI receives no federal funding. To provide expensive year-round program benefits, SOWI relies on nonprofit contributions from organizations, individuals, corporations, foundations, and fundraising by professional fundraisers. Indeed, professional fundraisers provide approximately 68 percent of SOWI’s annual income. 85 percent of these donations are from individual donors with long and reciprocally valued relationships involving financial support and volunteering with SOWI. These relationships are jeopardized by the proposed TSR amendments. Ultimately, the donations are used to fund competitions, training, and programs that not only help our athletes improve their skills, but also build self-esteem and confidence. In summary, SOWI fulfills its mission only through small donations from a large number of donors. Fundraising by professional fundraisers is essential to the survival of SOWI.

SOWI's reliance on professional fundraising is not unique. By necessity or choice, many nonprofit and charitable organizations rely on professional fundraisers to solicit charitable donations on their behalf. An estimated 60 percent to 70 percent of nonprofit and charitable organizations use professional fundraisers to deliver their messages to consumers and solicit donations. Jeff Jones, *Do Not Call: Proposed FTC Rules Could Hurt*, THE NONPROFIT TIMES (Mar. 2002) (citing Paulette Machara, CEO of the Association of Fundraising Professionals). Similar to SOWI, many of these organizations have small staffs in relation to the program benefits delivered. They simply do not have the infrastructure, personnel, operational efficiencies, and expertise to impart the fundraising message currently imparted by professional fundraisers.

Many nonprofit and charitable organizations have built constituencies through grass roots support. Telephones are the most practical and cost effective interactive medium for these organizations in recognition of the fact that direct (e.g., face-to-face) solicitation is logistically impossible and direct mail is cost prohibitive. Telephone calls by professional fundraisers confer obvious benefits. Trained professional fundraisers deliver prepared scripts, often created or approved by the nonprofit and charitable clients, to communicate the clients' messages. The fundraisers understand the unique state law requirements governing the communications. Most states require registration, bonds, and point-of-solicitation disclosures.⁷

⁷ Donations to nonprofit and charitable organizations are regulated extensively under state laws. The overwhelming majority of states that have passed "Do-Not-Call" statutes of one form or another expressly exempt or exclude coverage of nonprofit and charitable solicitations including solicitations by professional fundraisers on behalf of these entities – a

Ultimately nonprofit and charitable organizations reap benefits from this process including (1) donations from consumers to support the needs of the organization, and (2) delivery of the central message of the nonprofit and charitable organization. In the case of SOWI, telephone calls to current and prospective donors by professional fundraisers allow us to (1) recruit volunteers to participate in SOWI athletic competitions,⁸ (2) spread the special message of SOWI to elicit public support for our programs, and (3) request donations.

Nonprofit and charitable organizations rely on the expertise and operational efficiencies of professional fundraisers to conduct their fundraising campaigns and disseminate their message. SOWI employs several professional fundraising firms to provide these services with an extremely low incidence of complaints. There are advantages to this approach. Successful and cost-effective fundraising requires basic resources and specialized knowledge that nonprofit and charitable organizations lack. There must be a substantial investment of capital, a highly trained and supervised work force, and thorough knowledge of the state and federal regulatory requirements. Trained professionals offer significant resources, expertise and operational efficiencies that cannot be duplicated by nonprofit and charitable organizations.

approach rejected by the Commission here. And virtually every state imposes statutory and regulatory requirements on professional fundraisers soliciting donations on behalf of nonprofit and charitable organizations such as registration and licensing, posting of bonds, point-of-solicitation disclosures, fraud protection provisions, record keeping provisions, and annual reporting of financial information. These requirements serve numerous functions. They offer public information on the activities of charities, and they also allow state enforcement authorities to identify violations and prosecute where necessary.

⁸ SOWI relies on approximately 17,000 volunteers to contribute 350,000 hours to train our 9,000 athletes for 72 statewide competitions.

Indeed, that is why the substantial majority of nonprofit and charitable organizations rely on professional fundraisers.

The implications of the proposed TSR amendments are staggering as applied to nonprofit and charitable solicitations. The nature of nonprofit and charitable organizations' communications with current and prospective donors will change fundamentally. Nonprofit and charitable organizations will be forced to assume this communications role because, as the Commission advises, solicitation by their employees or volunteers is not covered by the Telemarketing Act and the TSR. This creates government imposed competitive disadvantages on smaller and mid-sized nonprofit and charitable organizations that do not have the resources, personnel and constituencies to take up the slack as compared to larger, national nonprofit and charitable organizations that are better funded and more capable of engaging in fundraising.⁹ Many nonprofit and charitable organizations – including SOWI – would lack the ability and expertise to perform these functions. To be sure, the proposed TSR amendments will have an adverse effect on SOWI by eliminating a major source of support for our athletes, interfering with the recruiting of support from volunteers and solicitation of donations, and reducing our ability to provide our athletes with programs including competitions and other education endeavors. Comparable adverse results would be experienced by all nonprofit and charitable organizations that depend on the services provided by professional fundraisers.

⁹ A compelling argument can be made that it would create an appearance of impropriety for the many state trooper and police organizations in the Coalition directly to contact donors.

V. The Commission Has Exceeded its Authority Under the Telemarketing Act and the USA PATRIOT Act by Expanding its Jurisdiction to Include Professional Fundraisers Acting on Behalf of Nonprofit and Charitable Organizations

The proposed TSR amendments misconstrue the Congressional purpose of the USA PATRIOT Act. Although the Commission acknowledges that the USA PATRIOT Act does not authorize the agency to regulate directly nonprofit and charitable organizations, Notice, 67 FED. REG. at 4497, nonetheless the agency employs a strained and flawed statutory construction that the USA PATRIOT Act amended the Telemarketing Act in a manner that “compels the conclusion that for-profit entities that solicit charitable donations now must comply with the TSR, although the Rule’s applicability to charitable organizations is unaffected.” Notice, 67 FED. REG. at 4497 (footnote omitted).

In reaching this conclusion, the Commission attributes three fundamental changes to the Telemarketing Act as a consequence of the USA PATRIOT Act. First, it contends that Section 1011(b)(3) of the USA PATRIOT Act amended and broadened the definition of “telemarketing” in the Telemarketing Act, 15 U.S.C. § 6306(4), by adding the term “charitable contribution,” although excluding contributions to political and religious organizations. Notice, 67 FED. REG. at 4496. Second, it asserts that Section 1011(b)(2) added to the “abusive telemarketing acts or practices” listed in the TSR certain disclosures by persons engaged in “telemarketing for the solicitation of charitable contributions.” Notice, 67 FED. REG. at 4496. And third, the Commission asserts that the USA PATRIOT Act amended the “deceptive telemarketing acts or practices” in the Telemarketing Act to include “fraudulent charitable

solicitations.” Notice, 67 FED. REG. at 4496.

The Commission correctly notes a defect in the USA PATRIOT Act that is relevant to understanding the underlying Congressional intention. That is, Congress expressed no intention to expand upon the Commission’s jurisdictional limitations under the Telemarketing Act. Notice, 67 FED. REG. at 4496 (“Notwithstanding its amendment of these provisions of the Telemarketing Act, *neither the text of section 1011 nor its legislative history suggest that it amends Sections 6105(a) of the Telemarketing Act* – the provision which incorporates the jurisdictional limitations of the FTC Act into the Telemarketing Act and, accordingly, the TSR”) (emphasis added). One such jurisdictional limitation is the well-established lack of authority by the Commission over nonprofit and charitable organizations. Notice, 67 FED. REG. at 4497 & n.49. And, as Congress unambiguously expressed in the Telemarketing Act, the Commission has no authority under the statute to regulate any activity not committed to the Commission’s jurisdiction under the Federal Trade Commission Act. 15 U.S.C. § 6105(a). *Accord* Notice, 67 FED. REG. at 4496-4497.

The Commission claims that the failure of Congress to remove the jurisdictional limitations of the Telemarketing Act, when read in conjunction with the USA PATRIOT Act’s mention of fraudulent charitable solicitations, “compels the conclusion” that the Congressional purpose in the USA PATRIOT Act was to regulate professional fundraisers soliciting charitable donations on behalf of nonprofit and charitable organizations. Notice, 67 FED. REG. at 4497. This interpretation is anything but compelled. It opens a Pandora’s Box of inconsistencies and inequities under the Telemarketing Act and TSR that certainly were not

intended by Congress. For example, though motivated by fraudulent charitable solicitations, there is no basis in the USA PATRIOT Act nor the legislative history to reach the conclusion that Congress believed that consumers are in more need of the Telemarketing Act protections where the charitable solicitation is performed by professional fundraisers on behalf of nonprofit and charitable organizations, as opposed to directly by the employees and volunteers of nonprofit and charitable organizations. And yet, under the proposed rule, this precisely is the outcome.

A more plausible interpretation of the USA PATRIOT Act is that Congress intended to regulate bogus charitable solicitations where the nonprofit or charitable cause itself is of a criminal or fraudulent nature. This is vastly different from regulating all professional fundraisers soliciting donations on behalf of legitimate nonprofit and charitable organizations such as SOWI. The most compelling evidence of this Congressional purpose is not even addressed in the Commission's proposed rulemaking, that is, the legislative history of the USA PATRIOT Act. The "Crimes Against Charitable Americans Act" was introduced by Sen. Mitch McConnell (R-KY) on October 2, 2001. In his explanation of the need for the legislation and its intended purpose, Sen. McConnell consistently stated that the bill was intended to address fraudulent charitable solicitations by "crooks" and "false charities" of a "criminal" nature:

- ▶ "But this largess have proven an irresistible target to **criminals** who prey upon the generous and good-hearted nature of Americans in this time of national emergency." 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).

- ▶ “We heard reports of **false charities** exploiting well-intentioned Americans during the Gulf War and after the Oklahoma City bombing and we now hear similar reports that the September 11 attacks have given these unusually **heartless criminals** new opportunities to perpetrate fraud.” 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).
- ▶ “Almost daily we hear of American citizens receiving solicitations from **phony charities**.” 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).
- ▶ “News reports from more than a dozen States, from New York to Florida to California, reveal that Americans are being asked to contribute to what turn[s] out [sic] to be **bogus victim funds, phony firefighter funds and questionable charitable organizations**.” 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).
- ▶ “Instead, this money is siphoned into the pockets of **cold-hearted criminals**.” 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).
- ▶ “These **crooks** often try to confuse their victims by using names that sound like reputable charities and relief efforts.” 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).
- ▶ “Other **crooks** use the name ‘firefighter fund’ or ‘victim’s survivors fund’ in their **fraudulent appeals**.” 147 CONG. REC. S10065 (daily ed. Oct. 2, 2001) (emphasis added).
- ▶ “Not only do they **steal valuable resources** from the most worthy of recipients, but they erode the trust of the American people in **legitimate charitable organizations**.” 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).

The legislative history confirms that Congress sought to authorize the Commission to address criminal and fraudulent charities, not the legitimate nonprofit and charitable organizations now singled out by the Commission. Sen. McConnell advised the Commission

as such on June 14, 2002, when he wrote Chairman Muris and stated that “[w]hen Congress enacted this legislation, it did not envision, nor did it call for, the FTC to propose a federal ‘do-not-call’ list, and certainly not a list that applied to charitable organizations or their authorized agents. . . . [T]he Crimes Against Charitable Americans Act never intended, called-for, required, or even envisioned the ‘do-not-call’ list that the FTC is now proposing.” June 14, 2002 Letter from Senator Mitch McConnell to The Honorable Timothy J. Muris (*available at* http://www.grandlodgefop.org/letters/ltr_020614_ftc.pdf) (accessed July 14, 2002).

In fact, the best evidence in support of this interpretation is a Commission-issued Advisory Opinion interpreting the TSR and carefully distinguishing between legitimate professional fundraisers as opposed to fraudulent telemarketing. In an 1995 Advisory Opinion issued to American Telephone Fundraisers Association, Inc., a professional fundraiser, the Commission concluded that the TSR generally imposes no restrictions on the legitimate fundraising activities of nonprofits, including professional fundraisers, because seeking donations is not “telemarketing” under the statute and rule. *See The Applicability of the Telemarketing Sales Rule—The Telemarketing Rule generally Imposes No Restrictions on the Legitimate Fundraising Activities of Nonprofit Organizations*, 120 F.T.C. 1154 (Dec. 15, 1995). The advisory opinion states:

The Commission’s understanding is that telephone fundraising on behalf of nonprofit organizations is not, in fact, typically undertaken as part of a “plan, program or campaign . . . conducted to induce the purchase of goods or services.” . . . Legitimate fundraising activity is conducted primarily to elicit donations and not to induce purchases. Even when donors receive gifts, premiums, memberships or other incentives, representatives of the non-profit sector have advised the Commission that legitimate charities generally do not

conduct telephone solicitations in which the stated or actual value of goods or services offered exceeds the amount of a donor's payment. *The Commission's enforcement experience suggests that fraudulent telemarketers, in contrast, obtain money from consumers by promising goods or services with inflated values as consideration for smaller "donations."*

Id. (emphasis added). The Advisory Opinion also acknowledges that the "Commission's construction of the term 'telemarketing,' as defined in the Act and the Rule, is *fully consistent with the legislative purpose of the Telemarketing Act*. The Commission's interpretation permits efficient interdiction of fraud without encumbering the legitimate use of telemarketing by sellers of good or services or by non-profit entities. In summary, until the proposed TSR amendments were introduced, the Commission's interpretation was that the Telemarketing Rule generally imposes no restrictions on the legitimate fundraising activities of nonprofit organizations." *Id.* (emphasis added).

VI. The "Do-Not-Call" Registry is Unconstitutional as Applied to the Noncommercial Speech of Nonprofit and Charitable Organizations and Their Professional Fundraisers

As applied to the noncommercial speech of nonprofit and charitable organizations and their professional fundraisers, the proposed "Do-Not Call" registry is unconstitutional because it violates the First Amendment right to freedom of speech.¹⁰ The Commission acknowledges that the First Amendment protections for nonprofit and charitable organizations "extend to

¹⁰ U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").

their for-profit solicitors.” Notice, 67 FED. REG. at 4497 n.51 (citation omitted).¹¹ The Commission concedes a “strong First Amendment protection of charitable fundraising.” Notice, 67 FED. REG. at 4522 n.286. And it agrees that solicitations by professional fundraisers on behalf of nonprofit and charitable organizations is fully protected speech, not commercial speech. Ultimately, the proposed TSR amendments and the “Do-Not-Call” registry “unduly intrude[s] upon the rights of free speech.” *Schaumburg*, 444 U.S. at 633.

The regulation of charitable solicitations by professional fundraisers on behalf of nonprofit and charitable organizations does not survive strict scrutiny, because charitable solicitations are fully protected speech. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 n.21 (1974). The proposed rule is not narrowly tailored to further a strong interest that the Commission is entitled to protect without interfering with the First Amendment protections of members of the Coalition. *Secretary of the State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 959-61 (1984); *Schaumburg*, 444 U.S. at 636-37. Where, as here, the Commission attempts to regulate the content of protected speech, it must employ the least restrictive means to advance the articulated interest. *Sable Communications of Cal., Inc. v. Federal Communications Comm’n*, 492 U.S. 115, 126 (1989). Clearly the Commission has not

¹¹ See *Riley v. Nat’l Fed. of the Blind*, 487 U.S. 781 (1988) (“Our prior cases teach that the solicitation of charitable contributions is protected speech, and that using percentages to decide the legality of the fundraiser’s fee is not narrowly tailored to the State’s interest in preventing fraud”); *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980) (“Prior authorities, therefore, clearly establish that charitable appeals for funds . . . involve a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment”).

satisfied this burden.

Even assuming that the privacy protection and fraud prevention interests cited by the Commission warrant some change in the current regulatory scheme, it does not follow that the “Do-Not-Call” registry is narrowly tailored enough to accomplish this objective constitutionally. Time and again, the Supreme Court has held unconstitutional any effort by government to impinge upon free speech rights by imposing unreasonable restrictions on professional fundraisers acting on behalf of nonprofit and charitable organizations. In *Riley*, as in *Munson and Schaumburg*, the government imposed restrictions focused on unconstitutional economic regulations. Here, the Commission proposes an equally infirm national “Do-Not-Call” registry (1) to which all professional fundraisers acting on behalf of nonprofit and charitable organizations must subscribe, (2) through which all communications with prospective donors must be filtered monthly, and (3) by which the Commission will prohibit certain solicitations or face federal, state or civil penalties.

Other constitutional problems are created by exempting specific industries that engage in inherently commercial telemarketing (for example, airlines, insurance companies, credit unions, telephone companies, banks) and specific types of conduct (for example, religious and political telemarketing and solicitations directly by nonprofit and charitable organizations). This facially discriminatory approach raises grave equal protection issues. By exempting certain commercial telemarketing from the TSR¹² but not excluding professional fundraising

¹² See Notice, 67 FED. REG. at 4493 n.17 (“In addition to these exemptions, certain entities including banks, credit unions, savings and loans, companies engaged in common

on behalf of nonprofit and charitable organizations, the Commission favors commercial speech over protected speech. The Supreme Court has held unconstitutional a government ordinance that accorded a greater degree of protection to commercial speech than noncommercial protected speech. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1980). This is exactly what is accomplished by the proposed rule – the commercial speech freedoms of banks, insurance companies and other exempt industries would be unregulated by the Telemarketing Act, while the fully protected speech of the nonprofit and charitable organizations in the Coalition would be burdened.

No less of a concern is the proposal to exclude political and religious contributions from the TSR based on a policy decision that religious discourse is a “paramount societal value” and a legal conclusion that political contributions are neither commercial nor charitable within the meaning of the USA PATRIOT Act. Notice, 67 FED. REG. at 4499. The exclusions only reinforce the discriminatory effects and unconstitutionality of the proposed rule. Under the proposed rule, contributions for “political parties and candidates” are not covered by the TSR because “they involve neither purchases of goods or services nor solicitations of charitable contributions, donations or gifts. . . .” Notice, 67 FED. REG. at 4499. And, purely “as a matter of policy,” the Commission proposes to exclude religious contributions because “the risk of actual or perceived infringement on a *paramount societal value* – free and unfettered

carrier activity, non-profit organizations, and companies engaged in the business of insurance are not covered by the Rule because they are specifically exempt from coverage under the FTC Act”).

religious discourse – likely outweighs the benefits of protection from fraud and abuse that might result from including contributions to such organizations. . . .” (emphasis added).

In doing so, the Commission favors political and religious speech over fully protected free speech and discriminates against nonprofit and charitable organizations. As the Supreme Court has explained, however, appeals for charitable contributions are inextricably intertwined with the underlying conveyance of information and ideas – that is, speech. *Schaumburg*, 444 U.S. at 632 (“solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease”). These protections are fully vested even where a professional fundraiser is the conduit of the nonprofit and charitable organization’s speech. These speech rights are entitled to the full protection of the First Amendment, and must receive no less protection than political speech or religious discourse.¹³

VII. Conclusion

Thank you for the opportunity to share the views of SOWI and the Coalition on the substantial harm to nonprofit and charitable organizations as a result of the Commission’s proposed TSR amendments and, specifically, the “Do-Not-Call” registry. We look forward to working with the Subcommittee to assure that the many important consumer benefits

¹³ The Coalition’s written comments to the Commission discuss other constitutional infirmities with the proposed TSR amendments including unconstitutional prior restraint and content based restrictions and are incorporated by reference.

conferred by nonprofit and charitable organizations are not reduced or eliminated by the Commission's proposed TSR amendments.